No. 80-1579

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

KURZ-KASCH, INC.,

Petitioner,

vs.

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 11,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Where an action has been brought by the Union to compel payment by the Employer of insurance premiums for retired personnel under the terms of an expired collective bargaining agreement, does the District Court commit reversible error when it stays the action and orders that the issue be arbitrated under the grievance procedure of that expired collective bargaining agreement which provides that "any grievance which has not been answered to the satisfaction of the Union shall at the request of the Union be arbitrated"?

2. Was the Circuit Court of Appeals correct when it found that, under the grievance provision of the collective bargaining agreement, as set out above, a District court could order arbitration only at the request of the Union?

SUMMARY OF ARGUMENT

The decision of the Sixth Circuit Court of Appeals found that, under the specific terms of the contract, the submission to the arbitral process of the dispute between the parties to the contract might be compelled only at the request of Local 11. Local 11 made no such request but rather chose to submit the matter to the District Court for adjudication.

The fundamental principle is that a party cannot be required to arbitrate a dispute unless he has first agreed to do so. Hence, under the specific facts of this case, and the specific language of the contract, the District Court was in error when it stayed the action and directed that the issue be submitted to an arbitrator. Moreover the Sixth Circuit Court of Appeals was correct when it then reversed that decision and remanded the case to the District Court.

All the cases cited by Petitioner are distinguishable in that the contract in each of those cases contained a mandatory arbitration clause. There is then no conflict between the decision of the Sixth Circuit in this case and the various decisions by the Supreme Court of the United States and the various Circuit Courts which are cited by the Petitioner.

The Petition for a Writ of Certiorari should be denied.

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The Respondent, Metal Polishers, Buffers, Platers and Allied Workers International Union, AFL-CIO, Local 11, respectfully requests that the Petition for a Writ of Certiorari in the above captioned case be denied on the ground that Petitioner has demonstrated no conflict between the decision of the Sixth Circuit Court of Appeals and any prior decision of the Supreme Court of the United States or of any of the other Circuit Court of Appeals.

STATEMENT OF THE CASE

1. The Union's Action (Sixth Circuit Case 79-3379)

A. Statement of Facts

The facts set out on page six of the Petitioner's Brief are basically accurate. To summarize, however, upon the expiration on September 14, 1975, of a collective bargaining agreement which had been in existence between the Metal Polishers, Buffers, Platers and Allied Workers, Local No. 11 (Local 11), and the Petitioner, Kurz-Kasch, Inc. (Company) the Company closed the affected plants and thereafter notified Local 11 that it would no longer continue to pay group insurance premiums for retirees as required under the terms of the expired contract.

B. Statement of the Case

Thereafter Local 11 filed suit in the District Court, Southern District of Ohio, Western Division under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, seeking a declaratory judgment that the Company had unlawfully terminated the said group insurance policies; a mandatory injunction requiring the Company to reinstate the same; and judgment for any loss suffered by members of the Local as a result of the termination of said insurance policies.

On April 5, 1977, the District Court stayed the action, and ordered that the dispute be arbitrated. In so doing, the Court noted the existence of a grievance and arbitration provision in the expired contract which, by its terms, authorized ". . . any employee or group of employees . . . (who) believe that . . . any provision of the agreement has been or is being violated . . ." to file a grievance. (Pet. App. 26) Step four of that grievance procedure provides

"any grievance which has not been answered to the satisfaction of the Union shall, *at the request of the Union,* (emphasis added) be arbitrated." (Pet. App. 60)

It should be noted here that the Circuit Court of Appeals, Sixth Circuit, specifically found that

> contrary to the express findings of the District Judge, it appears that . . . Local 11 . . . never agreed to submit the cause to arbitration . . .
>
> (Pet. App. 3)

Subsequently the dispute between the retired employees and the Company proceeded to arbitration. The Employer contended that the claim was not arbitrable, having been barred by lapse of time under the terms of the contract.

The arbitrator found that, procedurally, the grievance was arbitrable, and, on the merits, denied the grievance. Whereupon the District Court dismissed the Local 11 action on February 21, 1979.

An appeal was then perfected by Local 11 to the Circuit Court of Appeals for the Sixth Circuit, which, on December 17, 1980, found

> . . . Local 11 . . . never agreed to submit to the cause to arbitration; . . . While it is possible to review extensively each of the highly technical claims of error, the Court, after a review of the file, is convinced that in all events, under the expressed language of the collective bargaining agreement, *the provisions which are the subject of the dispute* in these appeals were not arbitrable, unless the Union requested arbitration.
>
> (Pet. App. 3)

The cause was thereupon remanded to the District Court for further proceedings. From that order Petitioner has submitted his Petition for a Writ of Certiorari.

ARGUMENT

1. Nature of the Duty to Arbitrate

There can be no argument with the proposition that the federal policy, as reflected in the statute, and as interpreted by the Courts, is that "final adjustment *by a method agreed upon by the parties* (emphasis added) is declared to be the desirable method for settlement of grievance disputes . . .". (29 U.S.C. § 173 (d))

Involved in this seemingly simple sentence are three factors, each of which must be present before there can be a duty to resort to arbitration of disputes. First, there must be an agreement, a contract, defining the method of resolution of disputes or grievances; second, the dispute must be between the parties to the agreement; and third, the nature of the dispute, i.e. the subject matter, must be one which is included in the terms of the agreement.

It follows that, since it is dependent upon an agreement, the duty to arbitrarte, if there is one, is a matter of contract. It is a duty, defined by agreement, and imposed by that agreement upon the parties. To quote this Supreme Court,

> under our decisions, whether or not a (party) is bound to arbitrate . . . is a matter to be determined by the Court on the basis of the contract entered into by the parties.
>
> *Atkinson* v. *Sinclair Refining Co.,* 370 U.S. 238, 50 LRRM 2435 (1962)

Although questions involving the parties to the contract, and the definition of the subject matter of the dispute, were not addressed by the Circuit Court of Appeals, it may be appropriate to consider them briefly.

The grievance procedure contained in the contract, (Pet. App. 26) is by its terms applicable to *"any employee* or *group of employees* covered by this agreement (who) believe that . . . any provision of this agreement has been or is being violated . . .". The individuals, on behalf of whom Local 11 brought suit, are not employees. They are of course third party beneficiaries of the contract between the Union and the Company, but they represent, rather than employees, a limited class of retirees, individuals who have retired with 15 years or more of seniority with the Employer. They are not members of the bargaining unit, nor would they have had standing to sue the Company to compel arbitration of the claim. *Moruzzi* v. *Dynamics Corporation of America,* 443 F.Supp. 332 (S.D. N.Y. 1977). Hence, under the terms of the grievance procedure as indicated above, since they are no longer employees, the grivance procedures are inapplicable to them.

This Supreme Court has defined the word "employee" as being "someone who works for another for hire" and has expressly recognized that retirees are not employees, and that their primary right of recourse for deprivation of vested contract rights is a suit under Section 301. The Court stated

> Since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the Employer . . .
>
> This does not mean that when a Union bargains for retirees — which nothing in this opinion precludes if the Employer agrees — the retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioners' consent . . . Retirees, moreover will have a federal remedy under Section 301 of the Labor Management Relations Act for breach of contract if their benefits were unilaterally changed.

Allied Chemical & Alkali Workers of America, Local No. 1 v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971)

These same principles were enunciated by the Sixth Circuit in *Hazen* v. *Western Union Telegraph Co.*, 518 F.2d 766 (1975):

> The Supreme Court has implied that (a retiree) has two avenues of recourse available without regard to acts or omissions of the Union, which is under no statutory duty of fair representation to her. See *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157, where it is indicated that a retired person who is no longer a member of a bargaining unit may either sue at common law under established contract principles or pursue a federal remedy under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for breach of contract.

Hence, resort to the Court under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 on behalf of the retirees was appropriate.

With reference to the *subject matter* of a dispute which may require arbitration this Court has established the general policy that "only those subjects which the parties specifically exclude, . . . will be excluded from arbitration". *Steelworkers* v. *Warrior & Gulf*, 363 U.S. 585.

The Company's contention that the decision of the Court of Appeals for the Sixth Circuit is in error is based almost exclusively on the existence of this general policy in favor of arbitration of all disputes, excepting only those which have been specifically excluded.

However, the decision of the Circuit Court of Appeals, Sixth Circuit, in this case does not involve the question of the subject matter of this dispute. Rather, it decided the threshold question, (i.e. whether or not the parties

were compelled, by the terms of the agreement, to arbitrate all disputes), in the negative. It based its decision upon the fact that the arbitration clause of the grievance procedure, Step four, specifically provides that arbitration will be had, *at the request of the Union.* Such a request was never made. As a matter of fact it was not made by either the Union or the Company.

Since the Court of Appeals, Sixth Circuit, found that there was no duty to arbitrate, it follows that the discussion of the question of the nature or subject matter of the dispute in this case, the comparison to other cases involving "severance pay" and the question of exclusion from the arbitral process of specific grievances, etc., all as set out in the Petitioner's brief, is inappropriate. The question involved here, as decided by the Court of Appeals, is "Does the contract contain a preliminary, fundamental duty to arbitrate?". Not "Is the dispute one which was excluded from the arbitration clause?".

Therefore, unless that decision is in conflict with other cases decided by the Supreme Court or other Circuits, the Petition for the Writ of Certiorari must be denied.

2. The Decision by the Circuit Court of Appeals is not in Conflict with Prior Supreme Court Decisions.

Contrary to the Petitioner's representations, this case is not controlled by *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965), (Pet. App. 12). That case involved an action brought by a laid off employee to recover severance pay due under the collective bargaining agreement. The Court, after discussing the question of whether or not a grievance concerning severance pay was excluded from the arbitration clause, went on to find that there was a mandatory arbitration provision which required all griev-

ances to be settled by virtue of the arbitration process. In that case Step four of the grievance procedure specifically provided that

> Grievances not satisfactorily settled in Step three may by written notice within ten days . . . of the . . . decision in Step three be appealed to an impartial arbitrator to be appointed by mutual agreement . . . within 15 days after *either* party has requested arbitration (emphasis added).
>
> 58 LRRM 2197, Footnote.

Since either party has a right to insist, under the terms of the agreement, upon arbitration of grievance disputes, the Court held that individual employees wishing to assert contract grievances must "attempt" use of the contract grievance procedure agreed upon by the employer and the Union as the mode of redress, before the individual employee may seek judicial relief.

Under the terms of the contract involved in our case there is no such mandatory arbitration clause. Arbitration may be had, under its terms, only if the Union requests it.

In addition, the *Maddox* case is not applicable here because, as indicated above, the grievance procedure in the relevant collective bargaining agreement limits the right to bring grievances to "any employee or group of employees covered" by the agreement. The individuals involved are no longer employees nor are they part of the bargaining unit represented by the Union. *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Company,* supra.

Nor is *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U.S. 235, applicable here. That case, overruling *Atkinson* v. *Sinclair Refining Co., supra,* created an ex-

ception to the prohibitions of the Norris-LaGuardia Act against the issuance of injunctions in labor disputes. It also, it is true, specifically states that an employer must arbitrate the underlying dispute if he is to receive the injunctive relief he seeks. However, the Court specifically points out that the exception to the Norris-LaGuardia Act is a very narrow one. That, before the injunctive relief requested can be granted, the Court must first find (1) the collective bargaining agreement contains a mandatory arbitration procedure (a mandatory duty on both parties to arbitrate); (2) the strike to be enjoined must be over an arbitrable grievance (i.e. the subject matter must be covered by the contract); and (3) that ordinary principles of equity must warrant the injunctive relief.

The Court in *Boys Market* found these factors to be present including a mandatory agreement to arbitrate in Article XIV, ¶ C, § 1, of the contract which provided "any matter not satisfactorily settled shall be submitted to arbitration *upon the written demand of either party*". 74 LRRM 2257.

Finally, the fact situation in *Boys Market* is totally inapplicable to this particular case. The Company is not seeking an injunction, nor is there any strike, threat of a strike, or even possibility of a strike involved in the subject case.

Nor is the decision in *Nolde Brothers, Inc.* v. *Local 358, Bakery and Confectionery Workers,* 430 U.S. 243 (1977), in conflict with the decision of the Sixth Circuit Court of Appeals.

The provisions of the contract, contained in Article XII, Grievance and Arbitration, § 2, provide "in the event that any grievance cannot be adjusted satisfactory by the procedure outlined above, *either* of the parties hereto may demand arbitration, and shall give written notice, . . .". Hence the question involved in the case was not whether or

not there was a mandatory duty to arbitrate all grievances. Rather it was a question of whether or not the subject matter of the dispute, i.e. severance pay for employees after the Company had gone out of business, was a matter to be included as one to be arbitrated.

The Court in that case concluded

> The parties agreed to resolve all the disputes by resort to the *mandatory* grievance arbitration machinery . . .

Hence, again, the question involved in *Nolde* was not whether there was a duty to arbitrate, but whether or not the subject matter of the dispute was one which was excluded from the arbitration clause.

To summarize, in each of the cases decided by the Supreme Court, cited by the Petitioner, there was a specific finding of a mandatory duty to arbitrate on the part of each party.

In our case, the contract provides that the duty to arbitrate shall be dependent upon the "request of the Union".

Hence there is no conflict between the decision of the Sixth Circuit Court of Appeals and the Supreme Court cases cited by the Petitioner.

3. The Decision of the Sixth Circuit Court of Appeals is not in Conflict with the Other Circuit Court Cases Cited by the Petitioner.

In the *IBEW, Local 278* v. *Jetero Corp.*, 404 F.2d 128 (Sixth Circuit, 1968) case, cited by the Petitioner, the injunction was denied to the Union not on the grounds of its refusal to defer to arbitration, but rather on the equitable grounds that the injunction would work hardships, injustice, and would be unenforceable.

The decision to compel arbitration of this and two other issues involved, was based upon the mandatory re-

quirement of the contract. This provision of the contract is not set out, but the Court does say specifically "the contractual requirement cannot be disputed". 88 LRRM at 2185

In *Chambers* v. *Beaunit Corporation,* 404 F.2d 128, 131, it was specifically found that "under Article IV of the Agreement, the Plaintiff . . . was required to submit the issues surrounding his discharge to arbitration". 67 LRRM at 2317

Similarly, in the *International Detective Service, Inc.* v. *Local 251* case the Court, citing the requirements necessary for a *Boys Market* type decision held "in the present case all of these prerequisites were met. The contract contained *a mandatory arbitration* clause, the strike arose over an arbitrable grievance." 103 LRRM at 2481

The argument raised in *Detective Service* by the Employer, against arbitration, was not that the contract did not contain a mandatory arbitration clause, but rather that the contract had expired. To which the Court said that if the Employer wanted the benefits of an injunction then it must necessarily also accept the responsibilities of the contract requiring arbitration.

In each of the cases cited by the Petitioner the contract involved contained a mandatory arbitration clause, as distinguished from the clause contained in the contract between the parties involved in the subject suit which provides that arbitration may be had "at the request of the Union". It cannot be said then that there is a mandatory arbitration clause requiring the Union to submit all disputes to the arbitrator. Moreover, the specific facts of this case distinguish it from those cited by the Petitioner in that the grievance procedure of the contract is limited to employees, and the individuals involved are not employees.

Since our case turns upon the specific fact situation, dis-

tinguished from the cases cited by Petitioner, there is no conflict.

CONCLUSION

The decision of the Sixth Circuit Court of Appeals found that, under the specific terms of the contract, the submission to the arbitral process of the dispute between the parties to the contract might be compelled only at the request of Local 11. Local 11 made no such request but rather chose to submit the matter to the District Court for adjudication.

The fundamental principle is that a party cannot be required to arbitrate a dispute unless he has first agreed to do so. Hence, under the specific facts of this case, and the specific language of the contract, the District Court was in error when it stayed the action and directed that the issue be submitted to an arbitrator. Moreover, the Sixth Circuit Court of Appeals was correct when it then reversed that decision and remanded the case to the District Court.

All the cases cited by Petitioner are distinguishable in that the contract in each of those cases contained a mandatory arbitration clause. There is then no conflict between the decision of the Sixth Circuit in this case and the various decisions by the Supreme Court of the United States and the various Circuit Courts which are cited by the Petitioner.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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